

1

2

3 UNITED STATES DISTRICT COURT
4 NORTHERN DISTRICT OF CALIFORNIA

5

6

7 THERON N. LYNCH,

8

Petitioner,

No. C 09-1747 PJH (PR)

9

vs.

ORDER OF DISMISSAL

10 JAMES A. HARTLEY, Warden,

11

Respondent.

12 /

13 Petitioner, a California prisoner currently incarcerated at Avenal State Prison, has
14 filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He has
15 paid the filing fee. The petition is directed to a conviction incurred in Alameda County in
16 2005. As grounds for relief petitioner contends that (1) an upper term sentence was
17 imposed based on facts not tried to a jury and found to be true beyond a reasonable doubt,
18 and (2) the sentence set out in the abstract of judgment is inconsistent with the oral
19 sentence, and the oral sentence should control.

20 In the petition Lynch says that he has a state habeas petition pending in Alameda
21 Superior Court. A review of the California Appellate Courts' website shows that a habeas
22 petition filed by petitioner was denied on September 23, 2009, and that another of his
23 petitions now is pending in the Supreme Court of California. Thus, although the superior
24 court petition probably no longer is pending, the supreme court one is.

25 The Ninth Circuit has held unequivocally that the exhaustion requirement is not
26 satisfied if there is a pending proceeding in state court, even if the issue the petitioner
27 seeks to raise in federal court has been finally determined by the highest available state
28 court in another context. *Sherwood v. Tomkins*, 716 F.2d 632, 634 (9th Cir. 1983). This is

1 because the pending state action might result in reversal of the conviction on some other
2 ground, mooting the federal case. *Id.* This is true not only in the *Sherwood* fact pattern,
3 where although a direct appeal was pending the federal issues had been decided by the
4 state courts via another procedural route, but also to this fact pattern, in which a state
5 postconviction proceeding is pending. See *Schnepf v. Oregon*, 333 F.2d 288 (9th Cir.
6 1964). Although *Younger* abstention¹ might seem a better rationale for this requirement
7 than exhaustion, see *Phillips v. Vasquez*, 56 F.3d 1030, 1038-39 (9th Cir. 1995)
8 (concurring opinion), the court is nevertheless required to follow *Sherwood*.

9 The petition must be dismissed without prejudice to refiling it when no further
10 proceedings are pending in the California state courts. See *Sherwood*, 716 F.2d at
11 634 (if state court action is pending, claims are not exhausted).

12 **CONCLUSION**

13 The petition is **DISMISSED** without prejudice to filing a new petition when no state
14 case is pending. The clerk shall close the file.

15 **IT IS SO ORDERED.**

16 Dated: October 21, 2009.


17 **PHYLLIS J. HAMILTON**
United States District Judge

18
19
20
21
22
23
24
25
26 P:\PRO-SE\PJH\HC.09\LYNCH1747.DSM.wpd

27

28 ¹ *Younger v. Harris*, 401 U.S. 37, 54 (1971).